**Fair Political Practices Commission**
**MEMORANDUM**

**To:** Chairman Getman, Commissioners Downey, Knox, Scott, and Swanson

**From:** Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

**Subject:** Proposition 34, Emergency Adoption of Amendments to Regulation 18428

**Date:** November 14, 2001

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## Introduction

At its monthly meeting in October, 2001, the Commission considered the adoption of a regulation implementing § 85311, added to the Act by Proposition 34 to govern the aggregation of contributions by "affiliated entities." The Commission decided that a regulation was not necessary to explain or implement the new statute, the language of which had been adopted by the Commission as its own "affiliated entities" regulation in 1995. But in its memorandum to the Commission on this subject, staff recommended conforming amendments to regulation 18428, which treats the reporting obligations of "affiliated entities." This regulation was amended in 1997 to accommodate the expanded definition of "affiliated entities" introduced by Proposition 208, now repealed by Proposition 34. As a result of these 1997 amendments, regulation 18428 contains provisions no longer supported by governing law.

The Commission agreed that it should consider the amendments described in staff's memorandum of September 24, 2001, and staff returns now to present those amendments for emergency adoption. The amendments described to the Commission in October affect only the first two subdivisions of regulation 18428, which currently provide that:

> "(a) The combined activities of affiliated entities (see 2 Cal. Code Regs. 18531.1) shall be used to determine whether a monetary threshold in the Political Reform Act or these regulations has been met or exceeded.
>
> (b) Affiliated entities which do not receive campaign contributions shall file one campaign statement reflecting their combined activities. The campaign statement shall be filed in the name of the person who **established, finances, maintains, or** controls the affiliate or affiliates, with an indication that the campaign statement includes the activity of these entities. The campaign statements must indicate which entity made each itemized payment. The committee shall identify on its next campaign statement the addition or deletion of any entity with which it

> becomes affiliated or with which it ceases to be affiliated." (*Emphasis added*.)

**Decision One: Amendments to Subdivisions (a) and (b)**

In subdivision (a) the reference to regulation 18531.1 is outdated. The latter regulation implemented the aggregation provisions of Proposition 208, and has accordingly been repealed. The citation to it here should therefore be deleted. In its place, staff recommends adding a reference to current § 85311, which now governs contributions of "affiliated entities," as well as a reference to 2 Cal. Code Regs. 18225.4, which provides for aggregation of their independent expenditures. By amending subdivision (a) in this fashion, the Commission will make it clear that the scope of this reporting regulation is limited to entities that are affiliated by their decisions to make contributions or independent expenditures, thereby affecting California campaigns, but not for reasons of ownership, structure or "control" in areas not regulated by the Act.

Subdivision (b) imposes a reporting obligation couched partly in the language of the Proposition 208 version of § 85311. The Commission may recall from staff's previous memorandum that, prior to Proposition 208, when one entity "directed and controlled" the contribution decisions of another, they were classifed as "affiliated entities." As amended by Proposition 208, § 85311 spread a much wider net, providing as follows:

> "All payments made by a person established, financed, maintained, or controlled by any business entity, labor organization, association, political party, or any other person or group of such persons shall be considered to be made by a single person."[1]

Proposition 34 replaced that statute with the current version of § 85311, which now (after amendment by SB 34) reads as follows:

> (a) For purposes of the contribution limits of this chapter, the following terms have the following meanings:
> (1) "Entity" means any person, other than an individual.
> (2) "Majority owned" means an ownership of more than 50 percent.
> (b) The contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual.

[1] Prior to its repeal, this statute was interpreted by former Regulation 18531.1, referenced in Regulation 18428(a).

> (c) If two or more entities make contributions that are directed and controlled by a majority of the same persons, the contributions of those entities shall be aggregated.
>
> (d) Contributions made by entities that are majority owned by any person shall be aggregated with the contributions of the majority owner and all other entities majority owned by that person, unless those entities act independently in their decisions to make contributions.

The four words of current regulation 18428, highlighted in boldface type on page one, reflect affiliation criteria added to the Act by Proposition 208, which may now be deleted from regulation 18428 as inconsistent with the current version of § 85311. The language remaining after deletion of these four words more closely tracks the current wording of § 85311 and regulation 18225.4.

To *precisely* reflect the current statutory language, it is necessary both to delete the four words left over from Proposition 208 and to insert the words "directs and" before "controls" in the fourth line of subdivision (b), to indicate that the standard of "affiliation" for reporting purposes is the same as the standard used for aggregating contributions in § 85311, and independent expenditures in regulation 18225.4. Finally, insertion of the words "expenditures of the" following the word "controls" brings this regulation fully into line with *Lumsdon* and *Kahn*,[2] the Commission's 1976 opinions which established the understanding of "affiliated entities" that, as explained in staff's prior memorandum, underlies the current § 85311.

After all this, the second sentence of subdivision (b) would read as follows:

> The campaign statement shall be filed in the name of the person who directs and controls the expenditures of the affiliate or affiliates, with an indication that the campaign statement includes the activity of these entities.

Staff recommends that the Commission adopt these amendments to subdivisions (a) and (b) to bring the current text of the regulation into line with the changes introduced by the newly enacted § 85311. This statute, whose scope is confined to certain parts of Chapter 5, may not *require* these changes to a regulation implementing the disclosure provisions of Chapter 4. Staff believes, however, that these amendments would reduce confusion among the regulated public during the upcoming elections, and facilitate compliance with the Act's reporting provisions if aggregation rules governing contributions and independent expenditures were the same as the corresponding rules that define the

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[2] *In re Lumsdon*, 2 FPPC Ops. 140; *In re Kahn*, 2 FPPC Ops. 151 (1976).

reporting obligations of affiliated entities, even if the Act does not expressly require that these rules be consistent for all purposes. Staff believes that the finding of emergency is supported for this reason.

**Decision Two: Deletion of Subdivision (c)**

While portions of subdivisions (a) and (b) were amended to bring the regulation into conformity with the new aggregation rules of Proposition 208, the *entirety* of subdivision (c) was drafted at the same time, for the same purpose. Under former regulation 18531.1(b), construing the broader "affiliation" standard of Proposition 208, "all contributions made by affiliated entities shall be considered to be made by a single person." Subdivision (c) was added to regulation 18428 to require disclosure of *all* contributions made (or expected to be made) within two years by entities affiliated with the reporting party.

Under current law, contributions must be aggregated only when "directed and controlled" by an entity other than the ostensible payor. With the loss of Proposition 208, there is no longer any statutory authority for requiring disclosure of "any" or "all" contributions of affiliated entities, if they do not meet the narrow criteria for aggregation under the new § 85311.

If subdivision (c) is removed from regulation 18248, filers will not be required to recognize two sets of "affiliated entities," one set as defined by § 85311 and another, broader group as defined by this subdivision. Staff believes that no useful purpose is served by leaving subdivision (c) in place, and that it should be deleted to eliminate confusion over identification of "affiliated entities." If the Commission agrees, the following subdivisions would be renumbered as indicated on the draft regulation.